

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL
with
Affidavit of Service

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with
Affidavit of Service

Docket No. 75-2115

75-2115

UNITED STATES COURT OF APPEALS
for the Second Circuit

JOSEPH TREMARCO,

Petitioner-Appellant,

-against-

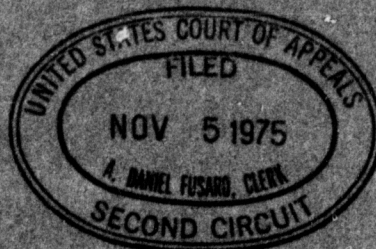
ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES
ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK,
DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK,
FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN
CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

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INDEX

	Page
Table of Authorities	i,ii
Preliminary Statement	1
Statement of Facts	2
Questions Presented	17
Summary of Argument	18
POINT I - ALTHOUGH THE INFORMATION CONTAINED IN THE 302 REPORTS OF THE F.B.I. AGENTS SANDIDGE AND COLLINS IS NEWLY-DISCOVERED, IT IS IMMATERIAL, CUMULATIVE AND IMPEACHING, AND ITS AVAILABIL- ITY TO APPELLANT AT TRIAL WOULD NOT HAVE AFFECTED THE VERDICT OF THE JURY.	19
POINT II - THE THEORY OF A CONSPIRACY BETWEEN THE FEDERAL AND STATE GOVERNMENTS TO ENGAGE IN PROSECUTORIAL MISCONDUCT IS BASED UPON APPELLANT'S DISTORTED VIEW OF THE FACTS.	26
CONCLUSION - THE JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DISMISSING THE PETITION FOR A WRIT OF <u>HABEAS CORPUS</u> , SHOULD BE AFFIRMED IN ALL RESPECTS.	30
APPENDIX	

TABLE OF AUTHORITIES

Cases Cited

	Page No.
<u>United States v. Wade</u> , 388 U.S. 218 (1967)	8
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	18,25
<u>Napue v. Illinois</u> , 360 U.S. 264 (1959)	26
<u>Jencks v. United States</u> , 353 U.S. 657 (1957)	10
<u>Mesarosh v. United States</u> , 352 U.S. 1 (1956)	20
<u>United States v. Morell</u> , _____ F. 2d _____, 17 Cr. L. 2521 (2d Cir. 8/29/75)	24
<u>United States v. Hilton</u> , _____ F. 2d _____ (2d Cir. 8/8/75) (Docket No. 74-2675)	24
<u>United States v. Rosner</u> , 516 F. 2d 269 (2d Cir. 4/29/75)	24
<u>United States ex rel. Rice v. Vincent</u> , 491 F. 2d 1326 (2d Cir. 1974)	18,21
<u>United States v. Brawer</u> , 482 F. 2d 117 (2d Cir. 1973), <u>cert. denied</u> , 419 U.S. 1051 (1974)	20
<u>United States v. Kahn</u> , 472 F. 2d 272 (2d Cir.), <u>cert. denied</u> , 411 U.S. 982 (1973)	24
<u>United States v. Keogh</u> , 391 F. 2d 138 (2d Cir. 1968)	
<u>United States v. Marquez</u> , 363 F. Supp. 802 (S.D.N.Y.), <u>aff'd</u> 490 F. 2d 1383 (2d Cir. 1974)	22
<u>United States v. Munchak</u> , 338 F. Supp. 1283 (S.D.N.Y.), <u>aff'd</u> 460 F. 2d 1407 (2d Cir.), <u>cert. denied</u> , 409 U.S. 915 (1972)	27

<u>People v. Simmons</u> , 36 N Y 2d 126 (1975)	25
<u>People v. Rosario</u> , 9 N Y 2d 286 (1961)	10
<u>People v. Parham</u> , 30 Cal. Rptr. 268 (Cal. App.), vacated on other grounds, 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P. 2d 1001 (1963), <u>cert. denied</u> , 377 U.S. 945, reh. denied, 379 U.S. 873 (1964)	14

Other Authorities

Federal Rules of Criminal Procedure, Rule 40 (Title 18, U.S.C.)	5,27
Note, 7 ALR 3rd 181,243. §10(h)	14

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FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN
CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, dated June 23, 1975, entered upon a memorandum and order of the Honorable Walter Bruchhausen, a United States District Judge, which judgment dismissed the petition for a writ of habeas corpus brought by the petitioner-appellant* Joseph Tremarco. Notice of appeal was timely filed on July 16, 1975.

* Hereinafter referred to as appellant.

STATEMENT OF FACTSA. MARCH 11 and 12, 1971

At the end of 1970 or the beginning of 1971, Harry Bogin was arraigned in Federal Court in Newark, New Jersey (145-46, 389; TR-A 111-12, 311).^{*} Arraigned with Bogin as a co-defendant was Joseph Tremarço (58, TR-A 43).

When Tremarço's name was called by the federal judge, Bogin looked at Tremarço. Thereafter, Bogin entered a fingerprint room in which the appellant was seated on a couch about twelve feet away from where Bogin was standing. Possibly ten or fifteen minutes elapsed during which Bogin viewed appellant. Once seated himself, Bogin continued to look at appellant. Finally, as Tremarço was being photographed, Bogin saw him "full face." The total period of time the two were together was about a half-hour (58-61; TR-A 45-47).

On March 11, 1971, at approximately 7:00 a.m., the same Harry Bogin left his house at 2783 Brighton 8th Street in Brooklyn, crossed the street on a slight diagonal and walked to where his company van was parked (52-53; TR-A 37-38). The front tire on the driver's side was flat (54; TR-A 38). As he stepped onto the curb, a man emerged from the rear seat of a car parked in

^{*} Numerical references without prefix are to the original trial transcript. The page numbers preceded by the designation "TR-A" refer to appellant's appendix in the state court, while those preceded by the letter "A" refer to the appellant's appendix on this appeal.

front of the truck. The man straightened up and turned toward Bogin. Bogin had "a full view of his face" for "no more than a second" (TR-A 40). He recognized the appellant immediately. The name Tremarco "flared in [his] . . . mind" (113; Tr-A79). The appellant was carrying a machine gun (55; TR-A 40).

"No!" screamed Bogin, and he started to run across the street. He heard shots, fell to the ground, but remained conscious. As the car sped away with its three occupants, Harry Bogin limped into his home and collapsed on his kitchen floor. He told his wife to call the F.B.I. and an ambulance and informed her that he had been shot by the appellant (64; Tr-A 49).

A portion of the dramatic events which occurred on Brighton 8th Street were witnessed by Mark Steinberg, a neighbor of Harry Bogin. As he was getting dressed on that clear, light morning, Mark Steinberg heard a series of loud sounds which were too rapid to be firecrackers (234-35, 239; TR-A 182-83, 187). When he looked out the window, he saw a Black Buick speeding down Brighton 8th Street and Harry Bogin crawling from the street into his own house (235; TR-A 183).

Steinberg immediately went to his neighbor's house where Bogin told him that he had been shot by a man with whom he had been involved in a case (236; Tr-A 184). Although at first, Bogin could only recall that the man's name began with a "T," his recollection improved and progressed through "'Joe Tommico,'" .

"Timco," "Temarco," until, while still on the kitchen floor, Harry Bogin said, "Tremarco" (237, 244; TR-A 185,192).

Patrolman Raymond Bini was the first law enforcement officer to speak with Harry Bogin. When he arrived at 2783 Brighton 8th Street, the man who was shot told the Patrolman that a man named "John Tremarco" had shot him (TR-A 174).

Other law enforcement personnel interviewed Harry Bogin at Coney Island Hospital on March 11, 1971. Detective Irwin Nacht was told by Bogin that he was shot by a "John Tremarco . . . [who had been] locked up with him in a Jersey case" (TR-A 243). Mark Steinberg also told the police that Harry Bogin said that he had been shot by Joseph Tremarco (268-69; TR-A 206-07). Also, special agents Gerald Collins (169; TR-A 135) and Philip Sandidge (204; TR-A 152) spoke with Bogin on March 11. Bogin told Agent Collins that he had been shot by Joseph Tremarco (169; TR-A 135).

Based upon the information provided originally by Harry Bogin, Edward John Boyd, V, then an Assistant United States Attorney for the Eastern District of New York, and Special Agent Charles R. Steadman of the F.B.I. jointly dictated the affidavit in support of a Federal warrant issued by Magistrate Schiffman which charged the appellant with having violated the "witness protection statute" (284, 374-76; TR-A 222, 296-98).

Similarly, an independently prepared warrant was issued out of the Kings County Criminal Court which charged "Joseph,

a/k/a John, Tremarco" with Attempted Murder and other lesser related crimes (336, 340; TR-A 260, 264).

The appellant was arrested by the Newark, New Jersey, police on March 11, 1971, and the Criminal Court warrant was lodged against him. Thereafter, appellant's custody was transferred to the Federal government. On March 12, 1971, at about 9:00 to 9:15 a.m., Raymond Brown, Esq., the attorney for a "Mr. Gimblestad" [sic] a co-defendant in Tremarco's New Jersey federal case, spoke with a Newark police captain who informed Mr. Brown that he could not then see the appellant as he was being transported to his arraignment on the Federal warrant (159; TR-A 125). Although Mr. Brown checked with the Magistrate in Newark, he soon learned that the appellant was to be arraigned in the Eastern District Courthouse in Brooklyn. Mr. Brown drove to Brooklyn (161; TR-A 127).

That same morning, Assistant United States Attorney Boyd was informed by an F.B.I. agent that there was no Federal Magistrate available for appellant's arraignment in Newark and therefore, pursuant to Rule 40 of the Federal Rules of Criminal Procedure,* Tremarco was brought to Brooklyn to be arraigned (291; TR-A 229).

At or about the time that Tremarco arrived at his office, Mr. Boyd was called on by several detectives of the New York City Police Department and by Thomas Davenport, an Assistant District Attorney in Kings County. Detective Nacht had been told by an F.B.I. agent

* Specifically, subdivision (a).

that Tremarco would be there (TR-A 265). At arraignment, Mr. Boyd recommended that the court release Tremarco on his own recognizance because "[a]t the time. . . , [there was] a terrific crowd of prisoners in detention at Federal headquarters, 427 West Street. [The Eastern District U.S. Attorney's office] . . . [was] doing everything . . . [they] could to eliminate . . . [the] jail population at that time."

"When it was made known . . . that the local [authorities] . . . wanted to pick up Tremarco for a[n] [attempted] homicide charge, and that they in all likelihood would be able to hold him in custody, it seemed to be the sensible thing to do, to give him to the local [authorities] and let them take care of it" (296; TR-A 234).

However, Mr. Boyd was never asked to nor did he ever cause Joseph Tremarco to be brought from Newark to Brooklyn to be arraigned, as an accomodation to the local New York authorities (305; Tr-A 243).

When Magistrate Catoggio adopted Mr. Boyd's recommendation, the appellant was taken into custody by Detective Nacht. Mr. Brown, who was then present, was assured that the appellant would be booked and arraigned and that no attempts would be undertaken to secure statements or place the appellant in a lineup (TR-A 132).

Nonetheless, in the late afternoon of March 12, Detective

Nacht accompanied the appellant into Harry Bogin's hospital room. The appellant was handcuffed. Although nothing was said by anyone while Tremarco and Bogin were in each other's presence, Bogin had been told by Assistant District Attorney Davenport that somebody whom Davenport wanted Bogin "to take a look at" would be brought into the room (126-27; TR-A 92-93). After the appellant walked out, Bogin said, "that was the man that shot me" (63; TR-A 48). The reason Harry Bogin expected the appellant to enter his hospital room was that he "had identified . . . [Tremarco] pretty fully" (133; TR-A 99).

Prior to this hospital showup, Harry Bogin was shown photographs of forty-eight (48) individuals by Agent Collins. Approximately the eighteenth to twentieth photograph exhibited to Bogin was that of Joseph Tremarco. Without hesitation, Bogin selected that photograph as of the individual who had shot him (TR-A 1160). Bogin then selected the photographs of Dominick Tremarco, the appellant's brother, and Hugo Ernest Colosanti and told Agent Collins that he may have seen them in the past (TR-A 164).

B. The Hearing Court's Findings of Fact and Conclusions of Law

Prior to trial, a Wade* hearing was held. As a result of the testimony adduced, the hearing court found as a matter of fact that: (a) the attorney Brown had been advised that no lineup would be conducted; (b) while the appellant was in Coney Island Hospital, down the hall from Bogin's room, the forty-eight photographs which had been marked in evidence at the hearing were shown to Bogin who selected that of Joseph Tremarco; (c) Tremarco's photograph was the eighteenth photograph exhibited to Harry Bogin; (d) approximately three months before the shooting, Harry Bogin had been in appellant's presence for at least a half-hour and "had time to look at him, to study him" (410; TR-A 332); (e) the appellant and the shooting victim were co-defendants in a case; (f) the appellant was picked up on a valid warrant charging obstruction of justice, and, (g) he was properly arraigned in Brooklyn.

Having made findings of fact, the court* arrived at its conclusions of law. They were that: (a) both the identification by photographs and that by showup were suggestive and violative of the appellant's constitutional rights (408; TR-A 330); (b) the prior meeting between the appellant and Harry Bogin in Federal

* United States v. Wade, 388 U.S. 218 (1967). -

** Honorable John A. Monteleone, Justice of the Supreme Court, Kings County.

court in Newark and the confrontation on March 11, 1971, when Bogin was shot, provided a sufficient independent source to support an in-court identification of the appellant by Bogin (410, 417-18; TR-A 332, 339-40); (c) there was no violation of due process in the appellant's arrest on the attempted murder case on March 12, 1971 (414; TR-A 336); and (d) the "Court has jurisdiction" of the appellant (418; TR-A 340).

C. The Alibi Defense

In an attempt to establish an alibi, the appellant called four witnesses in his behalf. Mrs. Priscilla Lodato lived with Joseph Tremarco on March 11, 1971. He awoke that day at 7:00 a.m. and left about 7:30 a.m. (TR-A 432). He returned from the cleaners sometime after eight a.m. and then left again. Later that day, Mrs. Lodato learned that the appellant had surrendered to the police (TR-A 442).

Aran Ashukain remembered Joseph Tremarco enter his dry cleaning establishment on March 11, 1971, at about 7:15 or 7:20 a.m. (TR-A 445). He recalled the exact time because it was before his employees who press pants arrived, and those individuals always arrive at 7:45 or 7:50 a.m.

On March 11, 1971, at about 7:30 a.m., Joseph Tremarco purchased gas from John H. Bridges (TR-A 464). Mr. Bridges remembered the time because the boy who pumps the gas had not arrived, and he always comes to work between 7:35 and 7:40 (TR-A 468).

Louis Romeo, a Newark fireman and tavern owner, employed the appellant in his tavern. He saw Tremarco at 8:00 a.m. on March 11, 1971, on a street in Newark. He knew it was 8:00 because he always leaves the tavern at that time to buy fish (TR-A 504).

D. The Proceedings at Trial Relating to Both The Defense's Subpoenas and the Request for Rosario* Material

Prior to trial, counsel for the appellant served subpoenas upon the F.B.I., the United States Marshal, the United States Magistrate for the Eastern District of New York and upon that District's United States Attorney (TR-A 24-25). Both the subpoena served on the Magistrate (TR-A 25) and that served on the Marshal (TR-A 25-27) were complied with.

Assistant United States Attorney Robert Rosenthal made application to quash the two other subpoenas (TR-A 25-27) upon the grounds that, "pursuant to Section 1611 of the Code of Federal Regulations" (TR-A 27), no matter such as that subpoenaed would be released without the consent of the Attorney General. In addition to providing the Court with a copy of the cited regulation, Mr. Rosenthal informed the court that no such consent was forthcoming (TR-A 29). Over objection, the motion to quash was granted (TR-A 30).

* People v. Rosario, 9 N Y 2d 286 (1961); Cf. Jencks v. United States, 353 U.S. 657 (1957).

Thereafter, following the direct examination of Harry Bogin by the assistant district attorney, appellant's counsel requested the reports taken by both the prosecuting attorney and the F.B.I. agent of their respective conversations with Harry Bogin (TR-A 70, 104-06). Although the assistant district attorney did provide defense counsel with a copy of his report ("the onion skin" - TR-A 70) (TR-A 155), he first informed the court that the F.B.I. agent had informed him that the United States Attorney's Office directed the agent "not to turn over any materials he has in his files" (TR-A 104). The court understood the agent's position to be "that there are other things pending in confidential matters other than what has to do" with the attempted murder (TR-A 118-19).

The agent, Gerald Collins, testified upon cross-examination by appellant's counsel that he had made a report concerning those incidents and actions taken of which he had given testimony (TR-A 137-38) known as a 302 report. Counsel for the appellant then demanded the report for purposes of the cross-examination of Agent Collins (TR-A 139).

The reports sought by counsel were said to "encompass several other federal violations" (TR-A 138). In response to further inquiry by the court, Agent Collins testified that the reports contained other, confidential matter and that to give up the report would result in the revelation of this confidential material (TR-A 138-39).

Upon further cross-examination, Agent Collins did not remember whether on March 12, 1971, Harry Bogin told him that on March 11 he had told his wife that appellant had shot him, but that he believed that Bogin did not tell him. If Bogin had told him, it would have been in his report.* Harry Bogin did tell Agent Collins that Mark Seinfeld was present and that fact, Agent Collins testified, was in his report.* It was Agent Collins' recollection on the witness stand that his report also included information indicating that Harry Bogin had told Mr. Steinberg that the appellant had shot him.** Once again the report was requested.

THE WITNESS [AGENT COLLINS]: No, sir. Your Honor, the report encompasses . . . several Federal violations in which Mr. Tremarco is currently under investigation by our office.

THE COURT: And you have been ordered not to produce them?

THE WITNESS: Yes, because it is one complete report involving several Federal violations, including obstruction of justice.

THE COURT: And you wouldn't produce that to any authority, including the judge; is that correct?

THE WITNESS: That's correct. That's my instructions.

(TR-A 172) (emphasis supplied)

* Agent Collins was correct. See 302 report of Agent Collins dated 3/12/71, dictated 3/16/71, at p. 19.

** Although the report is unclear, see final paragraph on p. 19: ". . . and had identified the individual . . ." (emphasis supplied).

The "any authority" to which the court and Agent Collins referred included the District Attorney. Thus, when counsel for the appellant requested F.B.I. reports concerning an interview with Mark Steinberg, the assistant district attorney informed the court that he possessed no Federal files (TR-A 203).

THE COURT: Do you [the assistant district attorney] know of such a report [of an F.B.I. agent's conversation with Mr. Steinberg]?

MR. DAVENPORT: No, I did not read their report. I was not allowed to read his file. So, therefore, I do not know what is contained in the file.
(TR-A 204)

When Agent Steadman testified, he, too, was asked if he had made a report. Although he replied that he had not done so, he did assume that "there [was a] . . . separate document or report pertaining to [the attempted murder] . . . or the obstruction of justice case" (TR-A 302). In response to the court's inquiry whether, assuming that he had such a report, he would turn it over to the Court, Agent Steadman replied in the negative. The court then indicated that it would adhere to the "[S]ame ruling" (TR-A 302), i.e., production would not be ordered absent the consent of the Attorney General.

Finally, in response to defense counsel's allegation that his client had been denied due process in not being furnished with the Federal records he had subpoenaed, the prosecutor argued that counsel was incorrect in suggesting that the state was responsible for the quashing of the subpoena.

MR. DAVENPORT: Failure of the Federal Government to respond to his subpoenas is not a denial by the district attorney's office of any of Mr. Gillen's [sic] rights. We are not stopping the Federal Government from doing it, which is being suggested by Mr. Gillen.

MR. GILLEN: I'm not suggesting anything.
(TR-A 318)

E. Post-Judgment Proceedings

On December 17, 1971, the appellant was sentenced to be committed to the State Department of Correctional Services for a maximum period of twenty-five years on the Attempted Murder conviction, a maximum period of ten years on the Assault in the First Degree conviction, and a maximum period of four years on the Possession of a Weapon conviction, all sentences to run concurrently.

On appeal to the Appellate Division, Second Judicial Department, appellant raised, inter alia, the issue of the failure of the trial judge to order the F.B.I. to turn over the requested reports. The People responded that a state court judge was powerless to order the F.B.I. to disclose its internal reports.*

The Appellate Division unanimously affirmed appellant's judgment of conviction, without opinion, by an order entered May 30, 1972. Permission to appeal to the Court of Appeals was denied on June 29, 1972. On December 4, 1972, the Supreme Court of the United States denied appellant's petition for writ of certiorari (A22a).

*See, e.g. People v. Parham, 30 Cal. Rptr. 268 (Cal. App.), vacated on other grounds, 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), cert. denied, 377 U.S. 945, reh. denied, 379 U.S. 873 (1964); Note, 7 ALR 3rd 181 at 243 §10(h).

On March 7, 1973, appellant filed a petition for a Federal Writ of Habeas Corpus.^{*} Having had the benefit of affidavits and memoranda from all parties and oral argument, the Honorable Mark A. Costantino, United States District Judge, filed a memorandum and order, requiring the United States Attorney (E.D.N.Y.) to turn over to petitioner's counsel those portions of the F.B.I. reports which relate to the statements made by the witnesses who testified at the state hearing. The District Court reasoned that

. . . the [state] court's finding [of independent source] was supported by the corroborating testimony of those persons who had spoken to Bogin shortly after the shooting and were told that Tremarco was the assailant and by the circumstances of Bogin's earlier acquaintance with Tremarco Of critical importance, however, was [Collins'] . . . statement that earlier that day Bogin had told him that Joseph Tremarco had shot him.
(A30a)

By letter dated June 1, 1973, the office of the United States Attorney complied with the court's order and furnished the requested portions of the 302 reports. The material provided consisted of six pages, numbered 14, 19, 20, 21, 22 and 23 (A41a-46a).

On September 19, 1974, the motion for an order granting appellant a new trial was marked off the calendar to enable appellant to exhaust his state remedies. The Supreme Court, Kings County on January 6, 1975, denied appellant's motion for an order vacating his judgment of conviction.

^{*} 28 U.S.C. §2254(a).

In a memorandum decision* dated December 18, 1974, the trial justice (Monteleone, J.), after examining the 302 reports submitted by appellant in support of his motion, determined that "[a] careful perusal of the F.B.I. reports . . . fails to disclose any matter that might have been helpful to the defendant or might have changed the result" (p. 2). Justice Monteleone further observed that "[t]he claim of fraud does not merit judicial consideration. The conduct of all parties was based upon honest belief as to the law and obligation of office. Nor was the defendant the victim of improper deprivation of helpful information in possession of the limited States (Brady v. Maryland, 373 U.S. 83)" (p.3).

When leave to appeal to the Appellate Division from Justice Monteleone's order was denied on March 3, 1975, appellant had, concededly, exhausted his state remedies. Oral argument was had before Judge Costantino on the restored motion. Although the motion was then transferred to the Honorable Walter Bruchhausen, Senior United States District Judge, the minutes of the March 21, 1975, oral argument had been filed. Furthermore, counsel for appellant and counsel for appellee District Attorney of Kings County participated in a "pre-trial conference" in the court's chambers.

In a memorandum and order, dated June 18, 1975, the District

* The decision, not included in appellant's appendix on this appeal, is appended at the end of appellee's brief.

Court dismissed appellant's petition. The Court wrote

The arguments presented for a new trial on newly discovered evidence are purely speculative, and the Court is convinced that the present record establishes that the jury verdict would have been the same even though the defense had been furnished with F.B.I. reports during the trial.
(A73a)

QUESTIONS PRESENTED

1. Did the refusal of the United States Government to disclose to appellant at trial 302 reports containing information which is immaterial, unfavorable to appellant, cumulative and of an impeaching nature violate the appellant's constitutional rights?

2. Is there any evidence in the record below to support appellant's allegation that the state government conspired with the federal government to suppress evidence?

ARGUMENTSUMMARY OF ARGUMENT

Simply stated, appellees contend that there is nothing contained in the 302 reports, to which appellant was denied access during his hearing and trial, which would entitle him to a new trial. Furthermore, although appellant has drawn several unique inferences from them, there is no dispute between the parties as to the facts of the case, sub judice, to require a hearing.*

It is appellees respectful submission that, under the facts and circumstances presented herein, there has been no suppression of evidence whatsoever by the state authorities, and that, therefore, to warrant a new trial, newly-discovered evidence must be material, not impeaching or cumulative in character and of such a nature as would have probably induced the jury to return a different verdict. Nothing contained in the 302 reports approaches this standard.

Nevertheless, if this Court is of the opinion that the suppression of evidence is attributable to the appellee District Attorney for Kings County, New York, appellees assert that the information in the 302 reports is neither material or favorable to the appellant.** Moreover, even the most skilled lawyer would be unable to put the newly-discovered evidence "to not insignificant use."***

* United States ex rel. Rice v. Vincent, 491 F. 2d 1326, 1331, n.3 (2d Cir. 1974).

** Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Keogh, 391 F. 2d 138, 146-47 (2d Cir. 1968).

*** United States v. Keogh, supra, at 147.

POINT I

ALTHOUGH THE INFORMATION CONTAINED IN THE 302 REPORTS OF THE F.B.I. AGENTS SANDIDGE AND COLLINS IS NEWLY-DISCOVERED, IT IS IMMATERIAL, CUMULATIVE AND IMPEACHING, AND ITS AVAILABILITY TO APPELLANT AT TRIAL WOULD NOT HAVE AFFECTED THE VERDICT OF THE JURY.

Of crucial importance to the People's case against Joseph Temarco was the ability of Harry Bogin to identify his assailant. Although he only saw the man with the machine gun "full face . . . for no ore than a second," Harry Bogin claimed that the face belonged to the appellant. In support of the accuracy of his identification of Tremarco, Bogin related the details of a previous viewing of appellant three months previously, while both were being arraigned in Newark Federal Court.

Although Bogin's testimony with regard to the Federal arraignment went uncontradicted (indeed, Raymond Brown's testimony tended to corroborate the fact that Bogin and appellant were co-defendants), appellant contested Bogin's identification of him as the perpetrator by producing four alibi witnesses.

Not only did Harry Bogin recognize Tremarco as the shooter, but also he revealed Tremarco's name to Mark Steinberg, Gerald Collins, Detective Nacht and Patrolman Bini. Each of these witnesses testified that Bogin had told him the name Tremarco, although the latter two recall being were told appellant's first name was "John." Also, contrary to the assertion of appellant in his brief (Appellant's Brief, p. 19, paragraph no. [12][d]), Special Agent Philip Sandidge was said by Agent Collins to have spoken with Harry Bogin on March 11, the day of the shooting (TR-A 152).

Had the 302 reports contained discrepancies in the identity of the shooter, they would have been material, non-cumulative and perhaps useful in creating a reasonable doubt. Nevertheless, they would still be of an impeaching value and therefore "not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial" Mesarosh v. United States, 352 U.S. 1, 9 (1956) (footnote omitted).

However, the information contained in the 302 reports confirms almost without exception, the truthfulness of the testimony of Harry Bogin, Gerald Collins, and Mark Steinberg. The Sandidge report of 3/11/71 and the Collins report, concerning his first conversation with Harry Bogin on 3/12/71, unequivocally state that Harry Bogin told each of them that Joseph Tremarco shot him.

The discrepancy between the Collins 302 and Bogin's testimony vis a vis where the latter was when he fell to the ground is hardly material, and no statement is more preposterous than appellant's counsel's statement in his Affidavit in support of a motion for a new trial that "[t]he prior statements of Mr. Bogin would have been of incalculable value at trial in cross-examination and would have insured an acquittal" (A62a, last sentence of first paragraph).

Unlike the situation this Court faced in United States v. Brawer, 482 F. 2d 117 (2d Cir. 1973), cert. denied, 419 U.S. 1051 (1974), where the pre-trial statements which were newly-discovered had not been made available to the trial court, defendant-appellant

and this Court, which remanded for a hearing on materiality, in this case all parties to the action, as well as all courts (including the original trial court), have been furnished with copies of the relevant 302 reports.

In the consideration of the materiality of newly-discovered evidence in another setting, this Court, in United States ex rel. Rice v. Vincent, supra, 491 F. 2d 1326 (2d Cir. 1974) reversed the order of the District Court which, without a hearing, had sustained the writ of habeas corpus and had ordered a new trial for the state defendant. Rice had claimed that the prosecution had withheld evidence that a fingerprint was initially designated by an expert as being of no value. This Court declined to order a new trial because it did not believe that the change in the fingerprint designation was material enough to have influenced the jury's determination of guilt.

Even of lesser relative materiality is the fact that Agent Collins' recollection was incorrect when he told appellant's counsel that his report would contain a notation that Harry Bogin told Collins that he had identified his assailant to Mark Steinberg. Steinberg testified that Harry Bogin had named Tremarco as the shooter, and Bogin told Agent Collins the name of the man who had attempted to kill him. Once Collins had that information, it is unlikely he would have asked Bogin whether he told Steinberg the same story.

Although the chief witness for the Government in United States v. Marquez, 363 F. Supp. 802 (S.D.N.Y.), aff'd 490 F. 2d 1383 (2d Cir. 1974), repudiated his testimony at trial in a conversation which was taped by the defense lawyers, he later claimed that there was only one inconsistency between the truth and his trial testimony. The Court (Weinfeld, J.) restated the general rule with respect to newly-discovered evidence:

The general standard governing motions for a new trial on the ground of newly discovered evidence is that the evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative or impeaching and of such a character that it would probably produce a different verdict in the event of a retrial.
Id., at 805 (footnote omitted).

Although the witness admitted that he had lied at trial, he told the hearing court that he had never informed the Government of his false testimony.

In language which is as applicable to the instant case as it was to Marquez, supra, the Court wrote,

The Government agents can hardly be accused of suppressing information which they did not possess.
Id., at 806.

Furthermore, the Marquez court's conclusion that the newly-discovered evidence "would not have raised a reasonable doubt in the mind of a single juror" is even more applicable to the case presently under scrutiny.

Although at trial it was the claim of appellant that there was collusion between the Federal and State governments in removing Joseph Tremarco from New Jersey and bringing him to Brooklyn, for the purpose of conducting an illegal show-up,* he is seemingly now expanding the claim of collusion to include the suppression of evidence (see Appellant's Brief, e.g., at 21).

There is very little evidence to be found in the record for the former proposition. There is no evidence to support the latter premise. Indeed, appellant claims that at a "full-blown hearing he would be able to establish the "conspiracy to cover-up." However, to be entitled to a hearing, appellant must do more than point an empty sleeve; he must place his finger on the facts in the record.**

Nonetheless, even under the relatively lower standards recognized in the case of prosecutorial suppression, the denial to appellant of access to the information in the 302 reports would not necessitate a new trial.

In United States v. Keogh, 391 F. 2d 138 (2d Cir. 1968), Judge Friendly categorized the various types of suppression. If the suppression is deliberate, which includes a failure

*Although the State court found that both appellant's removal to Brooklyn and his arrest on the attempted murder charge were proper (see Statement of Facts, supra, at pp.8-9), if, indeed there was a conspiracy, appellant was granted his deserved remedy--the suppression of the hospital show-up and photo lineup.

** See POINT II; infra.

to disclose evidence which is so valuable to the defense that the prosecution could not have missed it, it is error to fail to turn over the information if it is either material or favorable to the defense. Although the fact that Hary Bogin told the truth when he said he identified the appellant to the F.B.I., the police and his neighbor on March 11, 1971, is material, it is not material to the defense nor, obviously, is it favorable.

If the suppression is inadvertant, "a new trial is required only if there is 'a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction'" United States v. Rosner, 516 F. 2d 269, 272 (2d Cir. 4/29/75), quoting from United States v. Kahn, 472 F. 2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

In the case at bar, no finding was made below as to whether the suppression by the prosecutor was deliberate or inadvertant.* It is submitted that the reason for the absence of such a determination is that the prosecutor was never in possession or control of the evidence. Thus, both United States v. Morell, _____ F. 2d _____, 17Cr. L. 2521 (2d Cir. 8/29/75); and United States v. Hilton, _____ F. 2d _____ (2d Cir. 8/8/75) (Docket No. 74-2675), cited by appellant, are inapposite for both cases were remanded for a determination of whether the suppression of evidence was deliberate or inadvertant.

*Although, in his May 24, 1973, memorandum, Judge Costantino did believe that the state prosecutor would have turned over the statements to the defense if the reports had been in his custody (A35a).

The instant case is actually distinguishable from the deliberate - inadvertant analysis, for here, appellant requested the materials which were later disclosed. The case is therefore governed by the rule in Brady v. Maryland, supra, 373 U.S. 83 (1963),* which eliminates good faith as an excuse but still requires the information to be "favorable" to the accused, as well as material to guilt or punishment.

*See also People v. Simmons, 36 N.Y. 2d 126 (1975).

POINT II

THE THEORY OF A CONSPIRACY BETWEEN THE FEDERAL AND STATE GOVERNMENTS TO ENGAGE IN PROSECUTORIAL MISCONDUCT IS BASED UPON APPELLANT'S DISTORTED VIEW OF THE FACTS.

Having finally succeeded in gaining access to the 302 reports, appellant, no doubt, was dismayed to discover that the information contained therein corroborated, detail by detail, the testimony at the identification hearing.

However, he soon realized a way to do indirectly what the contents of the reports had realistically prevented him from achieving directly. Put another way, appellant originally attacked the legality of his detention by seeking what he had hoped were favorable reports. Upon discovering that they were quite devastating, he changed the basis for his habeas corpus claim. It is now not so much the contents of the reports themselves, but the fact that they were not turned over, which has become the gravamen of his claim.

And this base, in turn, is posited upon an accusation of perjury.* Although it may be true that the hearing court intended the phrase "without taking off the other matters" to mean the redaction process, it is most respectfully submitted that the court's inquiry of Agent Collins was confusing, and it is reasonable to infer from the answer given by Agent Collins that he

*If there was perjury, the state prosecutor could not have been a party to it since he was unaware of the contents of the 302 report. Compare Napue v. Illinois, 360 U.S. 264 (1959).

misinterpreted the question.* Indeed, the trial court, to whom the motion to vacate judgment predicated upon the very grounds raised upon this appeal, determined that there had been no fraud committed.

Furthermore, it is respectfully submitted that the trial court based its ruling upon the absence of the consent of the Attorney General. Agent Steadman confirmed that he would not have turned over to the court a separate report on the attempted murder had he prepared one. If impossibility to redact was the sole basis of the court's ruling as to Collins' 302 report, it is unlikely the court would have announced the "same ruling" with respect to Steadman's hypothetical, separate report.

The state hearing court also found that the removal of appellant to New York did not violate his due process rights. Although it is true that Mr. Brown testified that there was a magistrate available in Newark, Assistant United States Attorney Boyd testified that he was told that no magistrate was available. Further more, Rule 40(a) of the Federal Rules of Criminal Procedure (Title 18, U.S.C.) permits the arraignment of an accused before the nearest available magistrate where the arrest occurs within one hundred miles of the district out of which the warrant was issued.

*cf. United States v. Munchak, 338 F. Supp. 1283, 1289-90 (SDNY), aff'd 460 F. 2d 1407 (2d Cir.), cert. denied, 409 U.S. 915 (1972).

Appellant attempts to characterize the testimony of Mr. Boyd as unworthy of belief by ridiculing his use of the crowded detention facilities as an excuse for releasing appellant on his own recognizance (Appellant's Brief, p. 18). However, Mr. Boyd's testimony was that he was concerned with the overcrowded conditions and therefore was relieved to learn that the local authorities were present.

Finally, it is with the confusing testimony at the hearing regarding the ballistics report that appellant attempts to link the state and federal governments in a joint venture to cover-up. At the Wade hearing, Detective Nacht was asked by appellant for his DD5's or supplementary reports. In describing what he had with him in court, Detective Nacht explained that all the DD5's were still intact except that from Ballistics which is separate because it originates from an "outside command" (TR-A 249).

After referring to the ballistics report, Detective Nacht was asked by counsel for the appellant to describe the other reports. "Those are all the [other] DD5's" (TR-A 249). What is not indicated in the record, but what apparently occurred next is that, as defense counsel leafed through the DD5's, he asked whether all of the reports concerned the attempted murder, and he was told that one was a "canvass" (TR-A 249). No attempt was made by appellant's trial counsel or by the assistant district attorney to further identify the "canvass."

Certainly, though, it is unlikely that the ballistics report was the canvass (as appellant labels it in his brief [p.8]) because it comes from an outside command, and Detective Nacht was not from ballistics.

Since Detective Nacht refers to only one ballistics report, there is absolutely no justification for appellant's claim that the "state police [sic] and prosecution . . . declined to produce all the ballistic reports" (Appellant's Brief, pp. 18-19) (emphasis in original).

The charge is especially irresponsible in view of the statement regarding the ballistics report* made by appellant's counsel immediately prior to the opening statements at trial.

MR. GILLEN: I have no objection to the ballistics report and I had them yesterday from the Police Department and lo and behold, there is also a 32 caliber involved in that, but we weren't there, Your Honor. That's our position right throughout.**
(Tr-A 358) (emphasis supplied).

* The ballistics report, People's exhibit 2 in evidence, is appended at the end of this brief.

** However, when the contents of the 302 reports were revealed, the alibi defense was abandoned in favor of an "either/or" defense.

Since Agent Sandidge probably was also aware of the ballistics findings, he asked a logical inquiry of Harry Bogin. It was a question which appellant's trial counsel chose not to pose.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS, SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: Brooklyn, New York
November 5, 1975

Respectfully submitted,

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RICHARD C. LASKEY
Assistant District Attorney
of Counsel

APPELLEES' APPENDIX TO BRIEF

- A. Memorandum decision, dated December 18, 1974,
People v. Tremarco, Indictment No. 2164/1971

MEMORANDUM

SUPREME COURT KINGS COUNTY (CRIMINAL TERM PART I)

PEOPLE OF THE STATE OF NEW YORK

By MONTELEONE, J.

Dated December 18, 19 74

vs.

JOSEPH TREMARCO

Ind. #2164/71

APPEARANCES:

HON. EUGENE GOLD
District Attorney, Kings County
Municipal Building
Brooklyn, New York

GRUNEWALD, TURK & GILLEN, ESQS.
Attorneys for Defendant
16 Court Street
Brooklyn, New York 11241

This is a motion to set aside a judgment of conviction on the ground of (a) newly discovered evidence; (b) that the judgment was obtained by fraud; and (c) that the defendant's constitutional rights have been violated.

The defendant stands convicted of the crimes of (a) attempted murder; (b) assault in the first degree; and (c) possession of a machine gun.

The defendant was convicted of shooting one, Harry Bogin. The judgment was affirmed by the Appellate Division, Second Department, leave to appeal to the Court of Appeals denied and judgment affirmed, and leave to appeal to the United States Supreme Court denied by the Court of Appeals and the Supreme Court.

Thereafter, defendant moved in the United States District Court, Eastern District of New York, for an order requiring the United States to furnish him with certain F.B.I. reports heretofore denied to him. His application was granted in part. The United States claims full compliance with the order.

The court has carefully studied all papers submitted by both sides, including the minutes of the Wade hearing and the F.B.I. reports, supplied pursuant to the order of the United States District Court, and is constrained to deny the motion in its entirety.

The defendant presents no newly discovered evidence to warrant granting the relief requested. A careful perusal of the F.B.I. reports (the court accepts as truthful the representation of the United States' attorney that the F.B.I. reports furnished are all that pertain to the instant case), fails to disclose any matter that might have been helpful to the defendant or might have changed the result. The exact place where Bogin fell or his claim that he did not have a gun cannot be of help to the defendant. (There was no claim of self-defense at the trial.) The defendant suggests that if he had the information at his trial it might have led to other valuable information. This is sheer speculation. The court is satisfied with Bogin's identity of his assailant. The defendant fails to meet the criteria necessary for the granting of the relief sought (People v. Salemi, 309 N.Y. 208; People v. Bartholomew, 73 Misc 2d 541 [Co. Ct. 1973]).

The court is satisfied upon the present record of events that the result would have been the same even if the defendant had been furnished with the F.B.I. reports.

The court is further satisfied that the defendant's identity was sufficiently and constitutionally established. (The court notes, in passing, that the defendant contended at the trial that he was elsewhere at the time of the shooting, a defense obviously rejected by the Jury.) (U.S. v. Wade, 388 U.S. 218, 241; People v. Rahming, 26 N Y 2d 411; People v. Hanley, 27 N Y 2d 648; People v. Oakley, 28 N Y 2d 309, 312.)

The claim of fraud does not merit judicial consideration. The conduct of all parties was based upon honest belief as to the law and obligation of office. Nor was the defendant the victim of improper deprivation of helpful information in possession of the United States (Brady v. Maryland, 373 U.S. 83).

The evidence at the trial was sufficient to warrant the defendant's conviction.

The court concludes that the defendant presents insufficient cause for the granting of the relief requested.

Accordingly, the motion is in all respects denied.

J.S.C.

B. Ballistics Report
People's Exhibit 2, in Evidence

(DO NOT FOLD THIS REPORT)

Duplicate Copy Required For:

Pct.

SUPPLEMENTARY COMPLAINT REPORT

19. Pct.	Year	Det. Sqd. Ser.	Date and Time of Occurrence	Date of this report	22. U.F. 61 No.
60	1971		Mar. 11, 1971 0700 Hrs.	Mar. 15, 1971	16-5
				Arrest Nos. - Pct.	

SUBJECT: BALLISTICS EXAMINATION.

INJURED: LOGAN, Harry, N/A/27 of 27-83 Brighton 8th St.
 At 0515 Hrs., Mar. 11, 1971, notification was received at this office from Det. Nacht # 2598 - 60 Sqd., "Man shot at 27-83 Brighton 8th St., front of, to Coney Island Hospital". At 1010 Hrs., Mar. 11, 1971, arrived at scene to conduct ballistics investigation.

WOUNDS: Bullet wounds of 1. Left chest 2. Left buttock 3. Scrotum 4. Penis
 5. Crease of shoulder per Dr. Sami - injured in O.R.

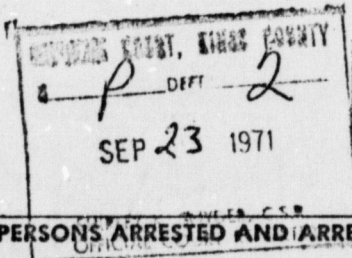
CLOTHING: BHE- Rear seat area of green corduroy pants
 BHE- Bottom rear of blue sweat shirt
 BHE & BHX- Top rear (shoulder area) of blue sweat shirt
 BH-Re-Entry same area
 BHX- Front of above
 ALL CLOTHING CUT AND MUTILATED TO REMOVE

EVIDENCE: 8- .45 Auto WRA 66 b.p. discharged shells marked "N" to "N7".
 1- 45 Cal. def., f.m.c., c.j. bullet, 232.0, R-?, marked "N".
 1- .32 Auto W-W w.p. discharged shell marked "N".
 Above described evidence recovered by Det. Nacht # 2598 - 60 Sqd.
 1- .32 Cal. def., f.m.c., c.j. bullet, 70.6, R-?, marked "C".
 Above described evidence recovered by this writer.

PROPERTY DAMAGE: BHE- Slat of green fence W/O 2786 Brighton 8th St.
 BHE- Right hood of Volkswagen sed. 5480 ID N.Y. parked diagonally across from 2786 B. 8th St.
 BHE & BHX - Right upper edge of storm window frame (outside side of house (702 Banner Ave.)
 BH-Re-Entry and BHX- opposite inside wall
 BHE & BHX - Storm window same side of above building, second window from rear of house
 BH-Re-Entry dining room wall near ceiling.
 2- Bullet impact marks - white boarder of brick wall - above house approx. 3' up from ground.

Scene searched for other ballistics evidence without results.

Above injured allegedly shot by unknown person(s) at time and place of occurrence.



B.S.# 2031

DESCRIPTIONS OF PERSONS WANTED, PERSONS ARRESTED AND ARREST DISPOSITIONS— See Appendix G of R. & P.

Investigating Officer's Name (Typed)
 DET. J.G. GORDON # 1980 B.S.
 Rank Shield No. Command

Investigating Officer's Signature

Commanding Officer's Signature

*Entries by S.R.S. only

M, He Men -
 Simon's

CITY OF NEW YORK
STATE OF NEW YORK) ss.:
COUNTY OF KINGS)

SARA GOODMAN, being duly sworn,
deposes and says:

That she is employed in the office of the
District Attorney of Kings County and is over the age of 18.
That on the 5th day of November 1975, she served the
within brief by enclosing a true copy thereof
in a postpaid wrapper addressed to Grunewald, ~~XRM~~ Turk, Gillen & Ford, Esq.
Attorney for defendant, at his office 233 Broadway, N.Y.C. 10007
and by depositing the same in a mail box located at the
Municipal Building, Brooklyn, New York

Sworn to before me this

Sara Goodman

5th day of

November

1975

5

at 11/15/75
MARK M. BAKER
Notary Public, State of New York
No. 30-450281 Qual. in Nassau County
Commission Expires March 30, 1977